No. 97-962 (3)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

*Petitioner,*

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

*Respondents.*

**On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division**

## BRIEF ON BEHALF OF THE COUNTY OF ESSEX IN OPPOSITION

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## QUESTIONS PRESENTED

I

In a proceeding to review the reasonableness of a public utility contract for the operation of a solid waste transfer station, does the State's rejection of an escalator clause providing for automatic rate increases exceeding the Consumer Price Index ("CPI") constitute a compensable taking where the utility has failed to establish a reasonable relationship between potential increases in the utility's operating costs and the CPI?

II

Did the State Board of Public Utilities effect a compensable taking when, in reviewing a utility contract that was expressly subject to acceptance and approval by the Board, it reasonably exercised its statutory authority to modify rates that were initially approved on an emergency basis?

III

Does the Fourteenth Amendment require the State to approve CPI-based enhancements in a public utility contract merely because it has approved CPI escalator clauses in other utility contracts arising out of materially different factual settings?

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## BRIEF ON BEHALF OF THE COUNTY OF ESSEX IN OPPOSITION

Respondent, the County of Essex ("County"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by petitioner, Solid Waste Transfer & Recycling, Inc. ("SWTR"), seeking review of a decision by the Superior Court of New Jersey, Appellate Division. That decision is reported at 299 *N.J. Super.* 577, 691 *A.2d* 846 (App. Div. 1997).

## COUNTERSTATEMENT OF THE CASE

### I. Background

Prior to the mid-1980s, Essex County, New Jersey ("County") disposed of non-hazardous solid waste originating in the County at an in-state landfill operated by the Hackensack Meadowlands Development Commission ("HMDC") (A73).[1] Faced with the landfill's scheduled closure in 1987, the County undertook plans to develop a resource recovery facility ("RRF") as a long-term solution to its solid waste problems (*Id.*). Due primarily to construction delays, the RRF was not completed in time for the closure of the HMDC landfill (A80).

Consequently, in December 1986, the County issued a "Solicitation of Interest" inviting proposals for the establishment of one or more solid waste transfer stations in the County (A83-85). A transfer station is a facility at which collected solid waste is separated by category and

[1] The Respondent will cite to the materials contained within SWTR's appendix as (A___).

transferred to larger trucks for transport to out of state disposal sites (A74). *See, N.J.S.A.* 13:1E-3(r). Under New Jersey law, transfer stations are regulated utilities, and the County's Solicitation of Interest accordingly advised all potentially interested parties that any proposed transfer station would be subject to review and approval by the New Jersey Board of Public Utilities ("BPU" or "Board").

The Solicitation of Interest attracted the interest of SWTR, Waste Management of New Jersey ("WMNJ") and seven other members of the solid waste industry (A85). Over the first four months of 1987, the County examined the responses it had received, and narrowed the field of contenders down to SWTR and WMNJ (A99). Negotiations ensued, and on July 1, 1987, the County executed transfer station contracts with both SWTR and WMNJ (A110).

SWTR's contract obligated it to operate an "interim emergency facility" for the processing of the County's solid waste at its site in the City of Newark, commencing in August 1987 (A108-109). SWTR's contract established a base rate for services to be provided by SWTR, as well as a clause providing for annual adjustments of 106% of the "CPI" (A109). That rate, by direct operation of New Jersey law, was subject to the BPU's plenary authority to review the reasonableness of solid waste disposal rates. *N.J.S.A.* 48:2-13; *N.J.S.A.* 48:13A-4; *N.J.S.A.* 48:13A-7.

The BPU's regulatory jurisdiction over the Transfer Station Contracts is expressly set forth in Article 2.7 of the contract, captioned, "Agreement Conditioned Upon BPU Approval", which states:

> The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to and conditioned upon acceptance and approval of this Agreement by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be an uncontrollable event . . . for purposes of determining the County's liability. . . .

(App. 5).[2]

## II. Proceedings Below

On July 16, 1987, with closure of the HMDC landfill two weeks away, the County commenced emergent proceedings before the BPU seeking to obtain the necessary approvals to allow the County to move ahead with the development of three (later reduced to two) solid waste transfer stations (A59). As part of its petition, the County requested authorization to impose substantial new charges on county ratepayers, to fund the cost increases stemming from the SWTR and WMNJ contracts.

On July 31, 1987, after holding an expedited hearing, BPU issued an order approving the County's proposed tariff rates on an interim basis, and provisionally accepting the SWTR contract (A60). In its order, BPU noted "the emergent nature of the petition," and further expressly reserved its "rights to amend, change or rescind such provisions of this Order, as in its judgment, the public good may demand." (App. 12).

Several municipalities thereafter challenged SWTR's and WMNJ's transfer station rates. On May 2, 1988, BPU

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[2] The Respondent will cite to the materials contained within its appendix as (App.___)

transmitted the matter to the Office of Administrative Law ("OAL") for a plenary rate hearing (A60). Several months later, in an interlocutory decision addressing procedural issues, the BPU noted that the determination of the reasonableness of the tariff rates charged by the County is "integrally related to and dependent upon resolution of the question of the reasonableness of the underlying contracts," and ruled that "[a]s public utilities, the Transfer Stations must bear the burden of justifying the reasonableness of their rates, i.e., the services fees and charges for [the County] under the contracts." [A70-71].

To like affect, in an interlocutory order issued on January 4, 1989, BPU reiterated that the issues to be resolved in the administrative hearing included both the reasonableness of the County's tariff rate and the reasonableness of the Transfer Station Contracts (A68). In the order, the Board took pains to emphasize that its prior "acceptance" of the Transfer Station Contracts, had been on an "interim initial basis," and to remind all the parties that it had not yet made any determination as to the reasonableness of SWTR's service fees, including the CPI escalator clauses (A68).

The administrative rate hearing commenced in November 1989, consumed 34 hearing days, and concluded on April 27, 1990 (A65). By Initial Decision dated December 26, 1990, the Administrative Law Judge ("ALJ") found that the Transfer Station Contracts, although rising out of a solid waste emergency, were "the result of arms-length negotiations in a competitive market," and recommended that they be approved in their entirety (A168).

On review of the administrative record, BPU rejected the ALJ's recommendation insofar as it called for approval of annual automatic rate increases of 106% of the CPI (A49, A52). The BPU held that those increases had not been shown to be reasonable from a traditional rate making (i.e., rate base/rate of return) standpoint. In this regard, BPU noted that the components of the CPI – food, housing, and electronic goods – did not, on their face, appear to have a close correlation to the basic costs of a transfer station, namely, costs of depreciation, landfill disposal, transportation, return on investment, and salaries (A50). Although ruling that SWTR had not met its burden of proving the reasonableness of CPI-based rate increases it was seeking, the Board upheld the previously approved interim rates (A55-56), and otherwise accepted the SWTR contract.

SWTR thereafter moved for reconsideration of BPU's decision. While the motion was pending, the regulatory functions of the BPU were merged with the State Department of Environmental Protection, which was renamed the Department of Environmental Protection and Energy ("DEPE") (A14). After lengthy review proceedings, on August 19, 1994, DEPE's Commissioner issued a final agency decision affirming BPU's rejection of CPI-based rate increases, and declining to award SWTR any additional amounts (A38-39). The Commissioner stated:

> I am in complete agreement with the Board's rejection of the CPI-based automatic increases sought by . . . SWTR.
>
> * * *
>
> Only when an automatic adjustment clause has been specifically selected to reflect the type

> of costs under review, has its use been permitted . . . [T]he CPI clauses here (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis. [footnote omitted.]
>
> . . . [T]he burden of proving every aspect of a rate's reasonableness is upon the utility . . . [R]equiring a solid waste utility to demonstrate a "nexus" between transfer station costs and the CPI . . . does no more than to hold WM[NJ] and SWTR to their burden of proving the reasonableness of their proposed rate . . . WM[NJ] and SWTR have failed to create a record supporting the reasonableness of automatic CPI-based increases. I therefore reject arguments raised by WM[NJ] and SWTR to the effect that the Board's reliance upon previous cases relating to automatic adjustment clauses was somehow unexpected and a denial of due process.

[A33-35].

SWTR thereafter sought review of DEPE's final decision in the Superior Court, Appellate Division. The Appellate Division, in a careful and unanimous opinion, affirmed, holding:

> The Board was not bound to accept the CPI-based automatic rate increase whether or not the clause was contained in a contract negotiated at arms length in a competitive market by . . . SWTR with the County. While the County agreed that its taxpaying community would bear the added costs of CPI-based rate increases . . . it could not abrogate the Board's statutory

> responsibility to review and modify public utility contracts to ensure a just and reasonable rate or charge. *N.J.S.A.* 48:13A-7. In this regard, neither the Board nor the DEPE abused their discretion or acted in an arbitrary, capricious or unreasonable manner.

[A22]. The Appellate Division also found that the Transfer Station Contract between the County and SWTR contained language requiring that it be construed in accordance with and be governed by the laws of the State of New Jersey, and that therefore, "WMNJ and SWTR knew or should have known from the outset in 1987 that they were public utilities and would function and be treated as such." (A19).

On May 12, 1997, SWTR sought discretionary review of the Appellate Division's decision in the Supreme Court of New Jersey. Finding no issues of substantial public importance, the Supreme Court denied SWTR's petition (A1).

## ARGUMENT

## THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE SWTR'S CLAIM OF AN UNCONSTITUTIONAL TAKING IS WITHOUT MERIT.

### I. Summary of Argument

In urging the Court to grant certiorari, petitioner asserts that the BPU and DEPE, by rejecting the CPI provision contained in its Transfer Station Contract, deprived petitioner of its "property" in violation of the

Fifth and Fourteenth Amendments. For this reason, petitioner contends, it is entitled to "just compensation" and asks this Court to remand the matter for entry of judgment in its favor in the amount of $3,427,493 plus interest.

This argument fails on its face to raise an issue worthy of review by this Court, since it involves a narrow, fact-sensitive issue of local interest only. The argument is also, on its own terms meritless, since the orders of the BPU and DEPE, as affirmed by the Appellate Division, accord with well settled principles vesting the BPU with the plenary authority to review and modify public utility contracts. The decisions below are entirely consistent with this Court's "takings" decisions, since the record resoundingly fails to support petitioner's assertion that the regulatory rejection of the CPI escalator clause resulted in an inadequate return on its investment.

In a rhetorically overblown effort to cast itself as a champion of the rights of private investors, petitioner claims to have received an "unconstitutional raw deal" (Pb17). The reality is that, in the course of an exhaustive administrative hearing, petitioner simply failed to justify the above CPI escalator clause provision contained in the Transfer Station Contract, and was unable to show that the clause bore a reasonable connection to the operating costs of the transfer station. Petitioner's "takings" arguments, are not only unsupported by the factual record, but are at odds with a substantial body of public utility law recognizing the broad authority of States to regulate, in the public interest, the reasonableness of utility rates. Since the decision of the Appellate Division is well-reasoned and soundly based on uncontroversial law, the petition for certiorari should be denied.

### A. The Regulatory Orders at Issue Did Not Deprive Petitioner of Its Property Without Due Process of Law in Violation of the Fifth and Fourteenth Amendments.

Petitioner does not dispute the plenary jurisdiction of the BPU to review the reasonableness of solid waste disposal rates in public utility contracts. *N.J.S.A.* 48:2-13; *N.J.S.A.* 48:13-A4; *N.J.S.A.* 48:13A-7. *In re Public Service Electric and Gas Co.*, 35 *N.J.* 358, 371, 173 *A.2d* 233 (1961). The Transfer Station Contract itself – including its CPI provision – was, by its express terms, subject to and conditioned upon approval by the BPU (App. 5).

In carrying out its statutory responsibility to review the reasonableness of the Transfer Station Contract rates, the BPU was obligated to scrutinize the administrative record to determine whether petitioner proved, by a preponderance of the credible evidence, whether the rate increases called for by the contract's CPI clause was justified. Concluding that they were not, BPU acted well within the ambit of its statutory discretion to modify the contract by eliminating the escalator clause. The orders of the BPU and the DEPE were not only supported by a careful review of the factual record, they were also bolstered by numerous decisions disfavoring utility rate increases tied to general inflationary factors. *See, e.g., Petition of Elizabethtown Water Co.*, 11 *N.J.A.R.* 303, 337 (OAL 1984), *rev'd on other grounds*, 205 *N.J. Super.* 528 (App. Div. 1985), *aff'd as modified*, 107 *N.J.* 440, 527 *A.2d* 354 (1987); *Re Jersey Central Power and Light Co.*, 65 *PUR 4th* 175 (N.J.B.P.U. 1985); *Re Commonwealth Water Co.*, 7 *PUR 4th* 456 (N.J.B.P.U. 1974); *cf., In re Otter Trail Power Co.*, 21 *PUR 4th* 254 (S.D.P.U.C. 1977).

Petitioner's one-dimensional focus on its asserted (and wholly artificial) operating deficit does not and can not undermine the well-supported finding that SWTR failed to carry its burden of demonstrating that the CPI escalator clause was reasonably related to the transfer station's operating costs. In its attempt to create a constitutional issue where none exists, petitioner disregards its own failure to present any proofs on this issue and ignores the established authority of the BPU to review and revise public utility contracts in the interest of the public. Indeed, the entire thrust of petitioner's argument appears to be based on the flawed proposition that the reviewing agencies were required to accept the CPI provision on a *carte blanche* basis without any regard for whether SWTR carried its burden of proving that the provision was reasonable and justified under the circumstances.

While it is axiomatic that a governmentally-fixed rate confining a public utility's return from operations to an amount below the point of confiscation violates due process, *Denver Union Stock Yard Co. v. United States*, 304 *U.S.* 470, 475 (1938), it is also well settled that a company operating in a heavily regulated field such as the solid waste industry need only "be permitted a return sufficient to assure its financial health." *State Farm Mutual Automobile Ins. Co. v. State*, 124 *N.J.* 32, 48, 50, 590 *A.2d* 191 (1991). Similarly, it is an established principle of public utility law that "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investor's interests provide only one of the variables in the constitutional calculation of reasonableness." *Permian Basin Area Rate Cases*, 390 *U.S.* 747,

769 (1968), (*citing Covington & Lexington Turnpike Co. v. Sandford*, 164 *U.S.* 578, 17 *S. Ct.* 198 (19___).

In this case, the record well supports BPU's, DEPE's, and the Appellate Division's findings that the CPI increases sought by the petitioner were unreasonable and excessive. The record yields a financial picture remarkably at odds with the portrait SWTR seeks to paint in its petition. To take the most glaring discrepancy, SWTR fails to acknowledge, anywhere in its papers, that its supposed "deficit" stemmed wholly form its gross undercapitalization. With an initial capitalization of $100,000 in common stock against $3.27 million in "notes payable" to the company's own shareholders, SWTR's debt to equity ratio exceeded 30:1. Since the shareholder "notes" were payable at rates of up to 16%, it comes as no surprise that the company would "show" a deficit in the early years of its operation.

Moreover, petitioner's assertion that it could have "shown a profit" of $704,924 during the first three years of its operation if the CPI increases were allowed is substantially, if not completely, undermined by the fact that SWTR held a five year lease with a company owned by one of its principals, in which SWTR agreed to pay above-market rent of $900,000 per year. At the administrative hearing, the County's real estate expert testified that the fair net rental value of the leased property under a comparable sales approach was $129,000 per year, or $750,000 less than SWTR had agreed to pay. Indeed, SWTR's own rebuttal witness testified that under a cost approach the fair net rental value of the property was $657,000 per year – still nearly $250,000 below the annual rent under the lease agreement. That the BPU declined to

disturb the ALJ's acceptance of SWTR's lease expense does not alter the economic reality that rent payable under the lease – not BPU's denial of requested CPI increases – was, by itself, a major factor in SWTR's alleged "deficit."

The overall picture that emerges from the first three years of petitioner's operation is that its five shareholders were able, on the strength of an investment of roughly $3.4 million, to generate gross receipts well in excess of $80 million. From this amount, the shareholders were able to make payments to themselves on their "notes" and in salaries, and pay above market rent to another company in which a principal of SWTR was an owner. On this record, DEPE acted well within the ambit of its regulatory discretion by finding that the CPI increases sought by petitioner were unreasonable and excessive.

Because the record is devoid of any evidence that the BPU's elimination of the CPI increases sought by petitioner resulted in the setting of a rate below the point of confiscation, the BPU's actions were fully consistent with the requirements of due process. Petitioner's reliance on *Duquesne Light Co. v. Barasch*, 488 *U.S.* 299, 307 (1989) (utility commission is constitutionally prohibited from setting a rate that is confiscatory of the utility's property rights) is unavailing in this matter, since none of the facts which petitioner has chosen to highlight satisfy any of the individual criteria contained in *Duquesne*.

### B. Modification of the Transfer Station Contract by the BPU Was Undertaken Pursuant to the Express Terms of the Contract and the BPU's Lawful Regulatory Authority.

Petitioner next offers a variation on its "taking" theme, arguing that because it allegedly caused SWTR to

operate in a deficit, BPU's rejection of the CPI escalator clause in the Transfer Station Contract resulted in a deprivation of its property for which petitioner is entitled to receive just compensation. The short response to this assertion is that the concept of "just compensation" is not even remotely at play where a state, in the lawful exercise of its regulatory authority, has appropriately modified a public utility contract on the ground that the contract contained a rate which was found to be excessive and unreasonable.

In making this assertion, petitioner ignores the fundamental principle that a contract with respect to public utility rates is "conclusively deemed to be made with knowledge and in contemplation of the sovereign power of the state to alter it." 73B *C.J.S.* "Public Utilities" at 164. More importantly, as noted above, that longstanding principle is expressly embodied in the Transfer Station Contract itself, which provides that the agreement is "subject to and conditioned upon the acceptance and approval of the BPU." Hence, BPU's initial order implementing the contract on an emergent and interim basis was clearly subject to modification at the conclusion of the rate proceeding.

Petitioner was fully aware, when it executed the Transfer Station Contract, of the existence of the State's sovereign regulatory jurisdiction and authority to amend the contract in question. *In re Application of Saddle River*, 71 *N.J.* 14, 23, 362 *A.2d* 552 (1976); *N.J.S.A.* 48:13A-7 (where BPU determines that rates or charges received for solid waste disposal services are excessive, "it may order the person charging such excessive rates or charges to make an adjustment in the tariff or contract to a sum

which shall result in just and reasonable rates or charges."). As pointedly noted by the DEPE Commissioner in his Order, "it is difficult to ascertain what purpose further rate proceedings would have served" had the contract not been subject to adjustment upon execution (A37). Hence, petitioner's assertion that it was denied the benefit of its contract because BPU rejected the CPI provision after petitioner performed under the contract utterly ignores the obvious and compelling fact that the Transfer Station Contract was entered into on an interim, emergent basis subject to BPU approval.

Finally, the argument that petitioner is entitled to just compensation in the circumstances presented here would, if carried to its logical conclusion, effectively eliminate the authority of the BPU to adjust utility contracts so as to set rates which are reasonable.

### C. Petitioner's Allegation of "Disparate Treatment" in Connection With Prior Decisions in Which the State Approved CPI-Linked Adjusters is Meritless.

Petitioner finally argues that because of determinations by the State upholding CPI-linked increases in three other instances, the rejection of CPI increases under the contract at issue here constituted "disparate treatment," for which, in petitioner's view, the State must demonstrate a "rational basis." Putting aside the obvious lack of any authority for this proposition, the three decisions upon which petitioner has chosen to focus actually serve to confirm the reasonableness of the State's decision to reject the CPI escalator clause in this case.

In *In re Petition of Union County Utilities Authority*, Docket No. CT 05930003 (Petition, Appendix G), DEP substantially rejected a 20 year contract under which ash residue from the Union County incinerator was to be landfilled at an out-of-state facility, but conditionally approved the contract for a 5 year period only. The contract in question contained a CPI escalator that was delayed in its implementation until the third year of the contract and was subject to an absolute cap of 4%. In contrast, petitioner's CPI escalator clause in this case was not delayed in its implementation and, so far from containing a cap, called for increases in *excess* of the CPI. The notable differences between the two clauses demonstrate the rationality of the agency's differing reactions to them.

The second case invoked by petitioner, *In re Passaic County Utilities Authority*, BPU Docket No. 508704360 (A218-219), is even less helpful to petitioner. From the text of the decision, it is impossible to ascertain what the terms of the escalator clause may have been. What stands out is that the approval of the contracts in question was specifically conditioned upon the requirement that financial information be furnished to the agency "each time new rates are filed or annually adjusted pursuant to the contract" (*Id.*). This resolution is perfectly consistent with the agency decision in this case. Ironically, the tipping fees in the *PCUA* case were "in the $65.00 range," which BPU pointedly noted "compares very favorably to other transfer stations tipping fees that have been proposed for various Northern New Jersey counties" (A218) – such as the $100+ fees to which the Transfer Station Contract gave rise.

Finally, petitioner's reliance on the factually remote decision in *In re SES Gloucester*, BPU Docket No. SE 85100984 (A216-217), is likewise unavailing. In that case, the BPU approved a 20 year rate formula for a resource recovery facility which included a formula for adjustments based upon changes in the Producer Price Index (PPI) (A34). As the DEPE Commissioner observed in his final decision in this matter, the agency's "approval" of the escalator clause in *In re SES Gloucester*, such as it was, was made expressly subject to "further Board review of each increase" (A34). Since the CPI clauses at issue here were not tailored to reflect transfer station costs and were not subject to any further ratemaking review or analysis, they were found to be factually distinguishable.

Accordingly, the decisions below are fully consistent with each of the three decisions discussed above. For this reason, petitioner's claim of "selective enforcement" must fail.

## CONCLUSION

The Transfer Station Contract at issue in this matter was entered into by petitioner with full knowledge that it was approved on an interim, emergent basis, and was subject to the jurisdiction of the BPU in its sovereign capacity to review and, if justified, modify the contract in the interest of the public. Petitioner was provided with a full and fair opportunity at an administrative hearing to present proofs of the reasonableness of the CPI clauses contained in the contract. Petitioner failed to meet that burden. In reviewing the ALJ's initial decision, both the

BPU and the DEPE considered the factual record at length and, in light of well established precedent, correctly concluded that petitioner had failed to demonstrate a nexus between the operating costs associated with the transfer station and the CPI-based escalator clause contained within the contract. Accordingly, there is no constitutional infirmity in the decisions of the BPU and the DEPE.

That petitioner allegedly operated in a "deficit" was neither caused by the decisions of the regulatory agencies involved nor ignored by the Appellate Division and the Supreme Court of New Jersey when petitioner unsuccessfully attempted to raise before those tribunals the due process arguments it has rehashed before this Court. Accordingly, respondent Essex County respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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# APPENDIX

## AGREEMENT FOR THE TRANSPORTATION AND DISPOSAL OF SOLID WASTE

THIS AGREEMENT FOR THE TRANSPORTATION AND DISPOSAL OF SOLID WASTE, made this 1st day of July, 1987 by and between SOLID WASTE TRANSFER AND RECYCLING, Inc., a New Jersey corporation (the "Transporter"), and THE COUNTY OF ESSEX, New Jersey, a body corporate and politic of the State of New Jersey ("County"),

WITNESSETH:

WHEREAS, pursuant to the New Jersey Solid Waste Management Act, County is charged with the responsibility of adopting a Solid Waste Management Plan to provide for the disposal of Solid Waste generated within the Essex County Solid Waste Management Planning District; and

WHEREAS, Transporter was created for the purpose of constructing, operating and owning Transfer Stations (as defined below) and transporting and disposing of Solid Waste received at such Transfer Stations; and

WHEREAS, Transporter has made certain representations and covenants with respect to Transporter's ability to perform such services within the County of Essex with respect to certain

* * *

## ARTICLE II

## TRANSPORTER SERVICES

2.1 *Construction and Operation of Transfer Stations and Disposal of Solid Waste.* For and in consideration of the fees set forth in articles III and IV and the covenants of the County herein, Transporter will construct or make all necessary capital improvements upon the Transfer Stations, will supply all equipment and personnel necessary to operate the Transfer Stations and to transport Solid Waste generated or deemed to be generated in Essex County to out-of-state disposal facilities according to the terms hereof, will obtain all necessary Permits and will provide all services relative to the operation of the Transfer Stations and to the transportation of Solid Waste, and all obligations and services as are more fully described in the Proposal as modified in the permits issued by DEP and BPU during the period of Interim Emergency Services and the period of Permanent Services. Transporter shall have the sole responsibility for, and and pay all costs attendant to disposal of solid waste in out-of-state disposal facilities.

2.2 *Term of Services.* Transporter agrees to commence providing Interim Emergency Services at 442 Frelinghuysen [sic] Avenue, Newark, New Jersey on August 1, 1987 and to transport Solid Waste received during Interim Emergency Services for disposal in out-of-state disposal facilities. Such Interim Emergency Services shall continue until the earlier of August 1, 1988 or the issuance of occupancy permit for the Transfer Station facility necessary to provide Permanent Service at 442

Frelinghusen [sic] Avenue, Newark, New Jersey. Permanent Service shall commence at Hill Street, Orange, New Jersey upon completion of that Transfer Station Facility.

Thereafter the Transporter shall provide Permanent Services to the waste generators which are directed to deliver Solid Waste to the Transfer Stations for the lesser of (i) five (5) years from the Commencement Date or (ii) Commercial Operation of the Facility.

The County may, at any time after startup of the Facility, and upon written instructions to Transporter, decrease the number of Tons of Acceptable Waste to be received at the Transfer Station so as to enable delivery of the same to the Facility. Solely for the purposes of this section, "Acceptable Waste" shall mean that term as defined in Section 1.01 of the Service Agreement by and between American Ref-Fuel Company of Essex County and the Port Authority of New York and New Jersey, dated February 28, 1986.

Upon Commercial Operation of the Facility, the Transporter shall provide those services described in Section 2.1 above at 442 Frelinghuysen Avenue, Newark, New Jersey for Solid Waste type 13 which is generated within the communities specified in the June 3, 1987 Solid Waste Management Plan Amendment until August 1, 1997.

2.3 *Nondelegability.* The services and obligations of Transporter may not be delegated or transferred to any Person without the prior express written agreement of County to such delegation or transfer. Transporter may enter into agreements for provision of services with

respect to fulfillment of Transporter's duties and obligations hereunder.

2.4 *Exclusivity.* Transporter shall use its best efforts, subject to Section 6.3, not to receive any Solid Waste at the Transfer stations other than Solid Waste generated or deemed to be generated within the County as provided in Section 6.3 by the residents and commercial, institutional and industrial establishments located within the boundaries of the County and which has been directed to the Transfer Stations pursuant to the waste flow orders of the Governmental Body with jurisdiction over waste flows during the term of this Transportation Agreement. Transporter shall be entitled to rely on waste origin documents supplied by Solid Waste collectors upon making deliveries to the Transfer Stations in satisfying its best efforts obligation to exclude Solid Waste other than Solid Waste generated or deemed to be generated in the County, except to the extent that Transporter knows or should know of the origin of such Solid Waste.

2.5 *Calculation of fees.* Transporter shall calculate the amount of Solid Waste delivered to the Transfer Stations by the haulers and generators of Solid Waste generated or deemed generated in the County based upon the difference in the weight of the delivery vehicles as weighed before and after the delivery of Solid Waste, and transporter shall charge for each ton of Solid Waste received at the Transfer Stations the Tipping Fee from such haulers and generators pursuant to articles III and IV hereof.

2.5.1 *Weighing of Deliveries.* Transporter shall maintain weighing facilities at the Transfer Stations for the purpose of providing its services under Section 2.5. Transporter, at its cost and

expense, shall test and recalibrate the scales as often as may be required by Applicable Law. Either Transporter or County may request more frequent testing of the scales at the requesting party's cost and expense. If at any time testing of the weighing facilities indicates that the scales do not meet New Jersey Bureau of Weights and Measures accuracy requirements, any adjustments of scale records actually recorded during the preceding thirty (30) days shall be negotiated by County and Transporter. The County will have the right to maintain personnel at the Transfer Stations to oversee weighing and other operations of the Transporter.

2.5.2 *Weight Records.* Transporter shall maintain a weight record containing the weight, date, time and vehicle identification of each vehicle entering and exiting the Transfer Stations.

2.6 *Right of Assignment.* The County shall have the right to assign its interest in, and rights and obligations under this Transportation Agreement to any public body implementing or otherwise responsible for a plan for the disposal of Solid Waste in the County. The County shall remain concurrently obligated with its assignee under this Transportation Agreement after such assignment.

2.7 *Agreement Conditioned upon BPU Approval.* The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to and conditioned upon the acceptance and approval of this Agreement by the BPU; provided, however, that the obligations of the County under Section 9.1.3 of this Agreement shall not be approved and accepted by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be

an Uncontrollable Event described in subsections (b) and (c) of the definitions for purposes of determining the County's liability under Section 9.1.3 of this Agreement.

2.8 *Agreement Subject to Approval by the Board of Freeholders.* The parties hereto understand and agree that the rights, duties and obligations of the parties hereto are subject to, and the effectiveness of this Agreement is conditioned upon, approval and acceptance of this Agreement by the Essex County Board of Freeholders. The parties further agree that should the Essex County Board of Freeholders fail to accept and approve this Agreement by resolution on or before July 8, 1987, this Agreement shall become null and void and neither party shall have any liability to the other.

(LOGO)

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
TWO GATEWAY CENTER
NEWARK, N.J. 07102

SOLID WASTE

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|---|---|
| IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX FOR A FRANCHISE AND APPROVAL OF CONTRACTS WITH SOLID WASTE TRANSFER AND RECYCLING, INC., AND WASTE MANAGEMENT OF NEW JERSEY INC. AND THE CO-APPLICATION OF ESSEX COUNTY SOLID WASTE TRANSFER AND RECYCLING, INC., FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, | ORDER<br><br>DOCKET NO. SE87070552 |

David Gartenberg on behalf of the Staff of the Board of Public Utilities.

Gordon, Gordon and Haley, by Michael Gordon, Esq., 30 Main Street, West Orange, New Jersey 07052, for the City of Orange.

Riccardelli, Gasiorowald and DeMassi, by Michael F. Riccardelli, Esq., 31 Park Street, Montclair, New Jersey 07042, for Solid Waste Transfer and Recycling, Inc.

H. Curtis Meanor, Esq., Acting County Counsel Norman Schulaner, Esq., Assistant County Council, County of Essex, Hall of Records, Dr.

Martin Luther King, Jr. Boulevard, Newark, New Jersey 07102, for Essex County.

Schwartz, Tobia and Stanziale, by Theordore A. Schwartz, Esq., 22 Crestmont Road, Montclair, New Jersey 07042, for Waste Management of New Jersey.

Sills, Beck, Cummis, Zuckerman, Radin, Tischman and Epstein, by Cecil J. Banks, Esq., 33 Washington Street, Newark, New Jersey 07102, for the City of Newark.

BY THE BOARD:

By petition filed on July 20, 1987, the County of Essex requested: (1) approval of a franchise for resource recovery and the operation of three transfer stations which was granted by the Board on July 27, 1987; (2) approval of contracts with Solid Waste Transfer and Recycling, Inc., for the operation of a transfer station at 442 Frelinghuyman Avenue, Newark, New Jersey, which will be operational on August 1, 1987; for a transfer station located at Hill Street, Orange, New Jersey, which will be operational upon completion at a future date and with Waste Management of New Jersey, Inc., for the operation of a transfer station at 100 Avenue A, Newark, New Jersey, which will be operational on August 1, 1987; and (3) approval of a Certificate of Public Convenience and Necessity.

Based upon an evaluation of the submission by staff, the evidentiary and public record developed at the public hearing held on July 28, 1987 and the emergent nature of the petition, the Board *HEREBY ACCEPTS* the contracts and *ORDERS* the following:

1. The Motion to Intervene of the City of Newark is granted.

2. The Motion to Intervene of the City of Orange is granted.

3. The Motion to Adjourn the proceeding by the City of Orange is denied for the following reasons: a solid waste emergency exists, i.e., the closure of the Meadowlands, the necessity of alternative disposal by August 1, 1987. In addition, it must be emphasized that these rates are interim and subject to refund.

4. The Certificate for the transfer stations at 442 Frelinghuyson Avenue and Avenue A in Newark, and the Certificate for the County, identified as SW No. 9019, to the County of Essex; SW No. 9019 Sub 1 to Waste Management of New Jersey, Inc.; SW No. 9019 Sub 2 to Solid Waste Transfer and Recycling, Inc., and SW 9019 Sub 3 to Multistate Intermodel Systems, Inc., subject to DEP approval of the registrations are approved. Multistate Intermodel Systems, Inc., is the company that will be responsible for transporting solid waste material on behalf of Solid Waste Transfer and Recycling, Inc.

5. The interim, initial, emergent tariff rate for the County shall be the actual proposed rates of $100.15 for Type 10 waste and $107.85 for Types 13, 23, 25 and 27 waste, subject to the following amendments to the County's tariffs:

   a. in the event that scales are not operational at the transfer station rates shall

be charged on a cu. yd. basis using a 3.3 compactor ratio.

b. All collectors are to be allowed to dump up to August 7, 1987, whether or not they have paid in advance for this privilege. Each collector by 1:00 p.m. August 7, 1987, must have paid for its prior dumping costs, its August 7, 1987, estimated dumping and its next two days dumping costs. After August 7, 1987, the collectors must pay for dumping privileges one day in advance. The County is also directed to have a representative at each transfer station, during open hours, to accept payments on a pay-as-you-go basis for a two-week period.

c. Each collector shall be required to have a two-week advance payment account with the County within 6 months. The account is to be funded in 12 equal installments due the 16th and 1st of each month beginning August 16, 1987.

d. No advance payments or deposits are to be required from municipalities.

6. Staff is directed to meet with all interested parties to examine the entire solid waste situation in Essex County, including the rate, and report back to the Board by October 1, 1987, with recommendations for further action, and if warranted staff is directed to send a letter to the Division of Community Affairs requesting assistance for municipalities that may need help in getting emergency funds to pay for dumping at the transfer stations.

7. Collectors are authorized to collect on an advance, interim basis, subject to refund, the rate increase occasioned by the County's rate. Procedures, similar to those used for the Labor Contract, are hereby authorized by the Board, including petitions within 10 days, backup material within 30 days, an effective date of August 1, 1987, and rates effective upon acceptance of filed tariffs by the Board. Collectors that have labor cases will be allowed to get two interim increases if they have already filed their Labor tariffs. However, the final rates for Labor and the Essex rate will be consolidated and no additional rate case expenses will be allowed for the Essex rate over those allowed for the Labor cases. Staff is directed to send a letter to all collectors outlining the appropriate procedures.

The County shall bill all customers as required by the *New Jersey Administrative Code* 14:3-7, *et seq.*, and additionally shall include the following information on all billings:

- Type of and frequency of service;
- Tariff rate applied;
- Number and size of containers, where applicable;
- Total quantity of waste collected;
- A separate line item showing the surcharge applied as required by the Recycling Act, *N.J.S.A.* 13:1E-92 *et al.*

Operations authorized herein are subject to the rights and duties of public utilities as set forth in Title as *New*

*Jersey Statutes Annotated* and the *New Jersey Administrative Code* applicable to public utilities.

This Order shall not limit, prevent or in any manner affect the authority of the Board or State to institute any proceeding, civil, criminal, regulatory, or administrative, in any federal or state court or agency with respect to anti-trust, monopoly, restraint of trade issues, "fitness to serve" or other activities of the parties to this proceeding. Nor shall this Order limit, prevent or in any manner affect the authority of the board or State to consider anti-trust, monopoly, restraint of trade activities, "fitness to serve" or other issues in any proceeding brought before the Board, or any federal or state court or agency.

Should the fitness to serve of Solid Waste Transfer and Recycling, Inc. or Waste Management of New Jersey, Inc., and Multistate Intermodel Systems, Inc., be successfully challenged in any legal and/or administrative proceeding, or should, Solid Waste Transfer and Recycling, Inc., or Waste Management of New Jersey, Inc., and Multistate Intermodel Systems, Inc., or its owners, directors, officers, or employees be found to have violated any statutory or regulatory provision, the Board hereby reserves its right to amend, change or rescind such provisions of this Order, as in its judgment, the public good may demand.

DATED: July 31, 1987

BOARD OF PUBLIC UTILITIES

BY: /s/ Barbara A. Curran
BARBARA A. CURRAN
PRESIDENT

/s/ George H. Barbour
GEORGE H. BARBOUR
COMMISSIONER

/s/ Robert N. Guido
ROBERT N. GUIDO
COMMISSIONER

ATTEST:

/s/ Ida Engelhardt
IDA ENGELHARDT
ACTING SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utility Commission.

/s/ Blossom A. Peretz
Secretary

DOCKET NO. SE87070552